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In the Supreme Court of the United States

OCTOBER TERM, 1985

MONON SHIPPERS ASSOCIATION, INC., ET AL., PETITIONERS
v.
INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

CHARLES F. RULE
Acting Assistant Attorney General

JOHN J. POWERS, III
STEPHEN MACISAAC
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

DENNIS J. STARKS
Attorney
Interstate Commerce Commission
Washington, D.C. 20432

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Petitioners seek review of the court of appeals' denial of an interlocutory injunction pending appeal of an Interstate Commerce Commission decision authorizing a rail line abandonment.

1. In the court below, the petitioners sought a stay of the decision of the Interstate Commerce Commission served April 4, 1985, authorizing the Seaboard System Railroad, Inc. (SBD), to abandon a 43-mile line of railroad between Frankfort and Indianapolis, Indiana. SBD sought to abandon the line pursuant to 49 U.S.C. 10903 and 49 C.F.R. Pt. 1152. Initially, SBD had sought and received Commission approval to abandon a 68.5-mile stretch of track known as the Indianapolis Branch. Subsequently, SBD informed the Commission that, based upon a commitment from a major shipper on the line to ship significantly increased volumes of traffic to and from its Frankfort facility, it would withdraw

its application with respect to the 25.5 mile segment between Delphi and Frankfort. In light of the partial withdrawal, the Commission ordered the proceeding opened for further hearing on modified procedure (Pet. App. 13a).

In that order, the Commission accepted additional evidence tendered by the railroad, consisting of revised data for operations over the entire line which it originally sought to abandon and data reflecting operations over the remaining Frankfort-Indianapolis segment which it still sought to abandon (Pet. App. 14a-15a). The Commission order also established a procedural schedule for protestants to reply to the railroad-tendered evidence (*id.* at 17a-18a).

Petitioners — Monon Shippers Association, Inc.; Jack O. Black (representing the United Transportation Union); and the Office of Utility Consumer Counselor for the State of Indiana — contended that the disclosure of SBD's intention to serve the portion of the line between Delphi and Frankfort (the northern segment) constituted a "changed circumstance" rendering obsolete all evidence previously submitted and considered in the initial decision. Petitioners also argued that no conclusion as to the Frankfort-Indianapolis portion (the southern segment) could be drawn from financial evidence for the entire line (Pet. App. 21a-22a).

In rejecting petitioners' contentions, the Commission noted that authority granted in an abandonment proceeding is permissive, and that the extent to which an abandonment is consummated is a matter solely within the carrier's discretion (Pet. App. 22a). Hence, had SBD waited until a certificate was issued in the original proceeding, it could have achieved the same result it now sought with no basis for complaint from petitioners (*ibid.*). The agency stressed that absent indications of fraud or abuse of the abandonment procedures, the timing of an applicant's disclosure of its intentions is immaterial. Having concluded that there

was no statutory or regulatory impediment to the partial withdrawal here, the Commission accepted the proposed amendment to the application (*ibid.*).

The agency also ruled that the acceptance of SBD's partial withdrawal did not require a new evidentiary presentation (Pet. App. 23a). The ICC concluded that, although SBD's decision to continue operations on the northern portion of the line was a changed circumstance, petitioners had not met their burden of demonstrating that the changed circumstance would alter the result previously reached as to the remainder of the line (*ibid.*). Inasmuch as reopening was necessary to consider Chessie System-wide data, and SBD had submitted and protestants replied to evidence on the line's southern segment, however, the Commission considered all such evidence and arguments in deciding to grant the amended application (*id.* at 24a, 27a-37a).

Subsequently, petitioners filed before the agency a petition for stay pending judicial review, which was denied by a decision served May 8, 1985 (Pet. App. 40a-46a).

2. On May 3, 1985, petitioners filed an emergency petition for stay and injunctive relief in the court of appeals. The court denied relief. It concluded that the decision of an administrative agency is presumptively lawful, citing *Coleman* v. *PACCAR, Inc.*, 424 U.S. 1301 (1976) (Rehnquist, Circuit Justice), and that "[t]he moving papers here do not persuade us that the ICC is wrong, or even likely to be wrong" (Pet. App. 3a). The court held that the petitioners failed to cast any serious doubt on the basic conclusion of the Commission that the line was unprofitable, and that, as this Court pointed out in *Hayfield N.R.R.* v. *Chicago & N.W. Transportation Co.*, No. 82-1579 (June 12, 1984), slip op. 5-7, Congress passed the Staggers Rail Act of 1980, 49 U.S.C. 10101 *et seq.*, to expedite the abandonment of unprofitable lines in order to stop the financial drain on

railroads (Pet. App. 2a-3a). The court of appeals also pointed out that petitioners did not assert that the appropriate bodies had made offers of subsidy pursuant to the Act to keep the line going, despite having "plenty of time to do so" (*id.* at 3a).

Subsequently, petitioners twice filed supplements to their motion for interlocutory injunction, vigorously attacking the court's May 3 decision and the accompanying opinion. These were treated as motions to reconsider, and were denied on the merits (Pet. App. 10a). Thereafter, on May 28, petitioners filed a petition for rehearing and suggestion for rehearing en banc. In denying this petition, the court noted that it was a successive request for rehearing, and that the court's rules do not provide for successive applications (*ibid.*). The court also pointed out that its policies do not permit the rehearing en banc of decisions on motions, and that only full decisions on the merits may be reheard en banc. It reproved petitioners for the "intemperate if not contemptuous language" in one of their filings (*id.* at 11a, note).

The court did not, however, deny petitioners' request out of hand. It took the opportunity to explain its May 3 order, pointing out that petitioners had misinterpreted its basis. The court explained that the thrust of its earlier opinion was that an administrative order is presumed valid and may be set aside pending review only if the movant makes a substantial showing that the agency is probably wrong. The court stated that in its earlier decision it did not hold that interim relief is never available in an abandonment case. Instead, the court said, its review of petitioners' applications for interlocutory relief, together with the ICC's decision, simply did not reveal convincing grounds for believing that the ICC was probably wrong (Pet. App. 11a). The scope of review is "very narrow," the court concluded, and

"the ICC's order here appears to address the essential issues" (*ibid.*)

3. This Court does not generally grant certiorari "to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent an extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville, T. & K. Ry.*, 148 U.S. 372, 384 (1893). Indeed, the Court has said that lack of finality "of itself alone furnished sufficient ground for the denial" of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See also, *e.g.*, *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970) ("piecemeal appellate review is not favored, * * * and this Court above all others must limit its review of interlocutory orders") (citations omitted).

The only reason given in the petition for seeking this Court's review in the present posture of this case is the unsupported assertion that "there can be no effective judicial review if [rail] service ceases for any extended period of time" (Pet. 14). It is nowhere explained why this should be so (the Commission disputes this point at Pet. App. 43a); certainly there is no showing of potential "extraordinary inconvenience and embarrassment." Moreover, SBD represented to both the court of appeals and the ICC on May 1, 1985, that it would not object to a partial stay requiring it to leave the Frankfort-Indianapolis line in place pending judicial review,[1] so that reactivation would require only minimal maintenance costs. The court of appeals' May 3 order directs Seaboard to give movants 14 days' notice "of any plan to remove the track or otherwise make the line unsuitable for rail service in the event this court ultimately sets

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[1]A copy of SBD's filings on that date has been lodged with the Clerk of this Court. There is an apparent typographical error in the court of appeals' May 3, 1985, order that SBD opposed such a limited stay (Pet. App. 3a).

aside the ICC's order" (Pet. App. 3a-4a). Petitioners assert no such notice and, indeed, acknowledge that "[t]he Court of Appeals left open the possibility of a stay at a future date to prevent dismantling of track pending judicial review" (Pet. 8).

4. In any event, the court of appeals did not err in denying injunctive relief.

Contrary to petitioners' assertion, the court of appeals did not interpret this Court's ruling in *Hayfield* as substituting an "unprofitability" standard for rail abandonments in place of the traditional balancing test established in *Colorado* v. *United States*, 271 U.S. 153, 168 (1926). The court of appeals simply noted that, in *Hayfield*, this Court acknowledged Congress's desire to lessen the length of time that financially strapped carriers would be burdened with such unprofitable lines. The court of appeals correctly concluded that injunctive relief would undo part of what Congress sought to achieve. The court further recognized (Pet. App. 2a-3a), as did this Court's decision, that subsidization procedures were also a part of the statutory scheme — and it pointed out the failure of petitioners here to avail themselves of them. The court of appeals' observance of and reliance on *Hayfield* was correct and entirely appropriate in determining whether injunctive relief should be granted, and its reliance on *Hayfield* did not in any way constitute the establishment of a new substantive standard for the ultimate assessment of the merits of an abandonment decision.

Nor did the court of appeals fail to apply the traditional balancing test for granting an interlocutory injunction (likelihood of success, irreparable injury, effect upon other parties, and the public interest) (Pet. 13). In its May 3 decision, the court stressed that it was deferring to the ICC's decision generally in this matter (Pet. App. 3a); that decision

weighed, besides the burden on the carrier, the interests of shippers and the community (see, *e.g.*, *id.* at 36a). As the court said in its June 3 opinion, "the ICC's order here appears to address the essential issues" (*id.* at 11a). The court also specifically weighed the likelihood that petitioner would prevail on the merits and found it lacking (*id.* at 3a; see also Pet. App. 43a). The court of appeals in denying a stay should not have to recite every applicable legal principle in its opinion. See *Coleman* v. *PACCAR, Inc.*, 424 U.S. at 1305 (Rehnquist, Circuit Justice).[2]

On the record before the court of appeals, the magnitude of the harm to the carrier from requiring continued operations was amply documented in the Commission's underlying decision. The harm to petitioners and others from permitting abandonment was also considered and determined not to be sufficient to require continued operations. In view

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[2]Petitioner also asserts (Pet. 10) that the "decision of the court of appeals is in conflict with the decision of other courts of appeals since enactment of the Staggers Rail Act of 1980 * * *." While this "conflict" is never explicitly elaborated on, apparently petitioner refers to the four decisions it lists on page 12 of the petition. Two of these are, like the decision below, Seventh Circuit cases. None of these decisions (to the extent they even applied post-Staggers Act law) expressly considered how or whether the Staggers Act changed the balancing the ICC does.

In any event, they do not reflect any difference about the legal standards to be applied by courts of appeals with respect to requests for interim relief from Commission decisions.

of the congressional policy discussed by this Court in *Hayfield*, the court of appeals quite properly declined to stay implementation of the Commission's authorized abandonment.

CHARLES FRIED
Acting Solicitor General

CHARLES F. RULE
Acting Assistant Attorney General

JOHN J. POWERS, III
STEPHEN MACISAAC
Attorneys

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

DENNIS J. STARKS
Attorney
Interstate Commerce Commission

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